No. 12280

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN NELSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

Statement of Basis of Jurisdiction.

Appeal from judgment rendered against Appellant Nelson by the United States District Court, for the Southern District of California, Central Division, upon a plea of guilty by said Appellant Nelson of violating Section 338 of Title 18, U. S. Code (1946 Ed.) (commonly known as the Mail Fraud Statute) as charged in Counts One and Two of the Indictment in this cause of action. [Indictment R. 2-5; Plea R. 11.] The Appellant was sentenced to a term of imprisonment of five years on each of Counts One and Two, said sentences of imprisonment to run consecutively and not concurrently, making a total period of imprisonment of ten years. Appellant was further sentenced to pay a fine of $1,000 on each of said Counts One and Two, or a total fine of $2,000, and to stand committed until said fine is paid. [Judgment R. 14-16.] Counts Three, Four, Five and Six of said Indictment

were dismissed on Motion of the United States Attorney. [Judgment R. 14-16.]

Thereafter, the Appellant duly filed Motion to reduce and correct sentence imposed. [R. 17-19.] Said Motion was duly considered by The Honorable Wm. C. Mathes, United States District Judge, and upon Findings of Fact and Conclusions of Law, an Order was duly entered by said Honorable Court denying the Motion of Appellant for reduction and correction of said sentence.

Thereafter, Appellant duly filed his Notice of Appeal from the judgment against him, within the time prescribed by law.

Thereafter, the record in this case was filed with the Clerk of this Honorable Court.

II.

Statement of the Case.

The record will show that on December 31, 1947, Appellant pleaded guilty to Counts One and Two of a six count Indictment charging violations of Title 18, Section 338, U. S. Code (1946 Ed.), and not guilty to Counts Three, Four, Five and Six, charging similar violations. [Plea R. 11.] Counts Three, Four, Five and Six were dismissed on April 14, 1947, on Motion of the Government. [Judgment R. 15.]

Counts One and Two of the Indictment, to which Appellant pleaded guilty, and to which judgment was entered against him, charge, in substance, that Appellant ". . . devised a scheme to defraud . . ." persons referred to in said Indictment, and ". . . to obtain money and property by means of false and fraudulent representations and promises contained in advertisements which he caused to be published in" newspapers named in said Indictment,

"well knowing at the time that the pretenses, representations and promises would be false when made." [Indictment R. 1-5.]

Count One further charges that "On or about December 10, 1946, at Los Angeles, Los Angeles County, California, . . ." Appellant "for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Mrs. Joel Nikolauson, 108 Canal Drive, Turlock, California." [Indictment R. 1-3.]

Count Two further charges that "On or about November 18, 1946, at Los Angeles, Los Angeles County, California," Appellant "for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Costa Mesa Globe Herald, Costa Mesa, California." [Indictment R. 4-5.]

III.

Argument.

There is but one question presented on this record for consideration by this Honorable Court, namely, whether the substantive counts constitute separate offenses or one single offense.

Appellee contends that each count constitutes a separate offense, and that the maximum penalty provided by the Statute can be imposed upon each separate Count.

In this connection, the record will show that Count One and Count Two charge that for the purpose of executing the aforesaid scheme and artifice to defraud, letters were deposited at two different times, to-wit, the mailing of the letter in Count One occurred on December 10, 1946, and the mailing of the letter in Count Two occurred on

November 18, 1946. On this point the law is well settled that the statute denounces as separate crimes each separate deposit of a letter in the mail for the unlawful purpose.

The law, apparently, is conclusive to the effect that each separate use of the mail, in execution of a continuing fraudulent scheme, constitutes a punishable offense.

Mitchell v. U. S. (C. C. A., N. M., 1944), 142 F. 2d 480, cert. den. 65 S. Ct. 49, 323 U. S. 747, 89 L. Ed. 598;

Weatherby v. U. S. (C. C. A., Okla., 1945), 150 F. 2d 465.

The gist of the offense under this section denouncing use of the mails to promote fraud is the mailing of a letter in the execution of scheme to defraud, and mailing and letter itself constitute the *corpus delicti,* and each letter deposited in or removed from the post office in furtherance of a fraudulent scheme is a separate violation of this section.

Bozel v. U. S. (C. C. A., Ohio, 1943), 139 F. 2d 153, cert. den. 64 S. Ct. 937, 321 U. S. 800, 88 L. Ed. 1570, rehearing denied 64 S. Ct. 1054, 322 U. S. 768, 88 L. Ed. 1596.

Under this section making use of mails in connection with a scheme to defraud an offense, a single scheme to defraud may involve a multiplicity of ways and means of action and procedure, and it may be that the complete execution of a single scheme will involve commission of more than one criminal offense.

U. S. v. MacAlpine (C. C. A., Ill., 1942), 129 F. 2d 737;

Mansfield v. U. S. (C. C. A., Tex., 1946), 155 F. 2d 952.

Several letters mailed in pursuance of a scheme to defraud constitute separate offenses under this section.

Becker v. U. S. (C. C. A., Cal., 1937), 91 F. 2d 550.

The mailing of each letter containing forged supply orders whereby relief funds were misappropriated was a distinct substantive offense under this section.

Stumbo v. U. S. (C. C. A., Ky., 1937), 90 F. 2d 828, cert. den. 58 S. Ct. 282, 302 U. S. 755, 82 L. Ed. 584.

Each mailing constitutes separate violation of this section.

Spirou v. U. S. (C. C. A., N. Y., 1928), 24 F. 2d 796, cert. den. 48 S. Ct. 559, 277 U. S. 596, 72 L. Ed. 1006.

While the practice of treating two letters relating to the same fraud as separate offenses is not approved, conviction on such a charge, resulting in two maximum sentences, cannot be set aside.

U. S. v. Steinberg (C. C. A., N. Y., 1932), 62 F. 2d 77, cert. den. 53 S. Ct. 526, 289 U. S. 729, 77 L. Ed. 1478.

Each individual act of taking a letter or package from a post office or putting a letter or package in a post office, in furtherance of a scheme to defraud, constitutes separate and distinct offenses, and each violation may be separately punished.

U. S. ex rel. Bernstein v. Hill (C. C. A., Pa., 1934), 71 F. 2d 159.

IV.

Conclusion.

It is respectfully submitted that Count One and Count Two of the Indictment charge separate offenses against the laws of the United States; that the Appellant was not sentenced twice for a single offense, and that the Motion to correct an illegal sentence was properly denied, it being shown that the sentence imposed by the Trial Court was not an illegal sentence.

Respectfully submitted,

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